BIBLE READING IN PUBLIC SCHOOLS HELD UNCONSTITUTIONAL

Schempp v. School District of Abington Township
177 F. Supp. 398 (E.D. Pa. 1959)

Plaintiffs, as parents and members of the Unitarian faith, sued to enjoin compliance with a Pennsylvania statute requiring daily reading in the public schools of at least ten verses of the "Holy Bible" without comment[1] and also to halt the practice of accompanying the reading with mass recitation of the Lord's Prayer. The plaintiff's children were compelled to participate in these "devotions." The three-judge district court held this program unconstitutional[2] because compulsion to participate was a violation of the pupils' right to free exercise of religion. Furthermore the statute effected the establishment of religion insofar as the practice aided the Christian religion in particular and religion in general by direct reminder of man's relation to God.[3]

The constitutionality of the practice of Bible reading in public schools has never been tested on the merits by the United States Supreme Court,[4] although there are decisions relating to the validity of released time programs encouraging religion generally.[5] Bible reading in public schools, often accompanied with some additional devotional practice such as prayer recitation or hymn singing, is a common practice, permitted by most states and even required by some.[6] Validity of the practice is generally sustained on the theory that the Bible is non-sectarian[7] and unobjectionable to a believer in God.[8] A minority of the state courts,[9] however, have condemned

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[1] 24 PA. STAT. 15-1516 (1949).

[2] 177 F. Supp. 398 (E.D. Pa. 1959).

[3] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I, made applicable to the states by U.S. CONST. amend. XIV, Palko v. Connecticut, 302 U.S. 319 (1937).

[4] Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), *app. dism'd.* 342 U.S. 429 (1950).

[5] Zorach v. Clauson, 343 U.S. 306 (1951); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1947).

[6] See ALA. CODE tit. 52, §§ 542-44 (1940); ARK. STAT. § 80-1606 (1947); DEL. CODE ANN. tit. 2, § 758 (1953); FLA. STAT. § 231.09 (2) (1953); GA. CODE ANN. § 32-705 (1936); IDAHO CODE ANN. § 33-2705 (1947); KY. REV. STAT. § 158.170 (1948); ME. REV. STAT. ANN. *c.* 37, § 127 (1944); MASS. ANN. LAWS c. 71, § 31 (1945); N.J. STAT. ANN. § 18:14-77 (1940); PA. STAT. tit. 24, §§ 1555-56 (1936); TENN. CODE ANN. § 2343 (4) (Williams 1934).

[7] *But See* 177 F. Supp. 398 at 401-2; Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936).

[8] People v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Wilkerson v. City of Rome, 152 Ga. App. 762, 107 S.E. 47 (1921); Billard v. Board of Educ., 69 Kan. 53, 76 Pac. 422 (1904); Hackett v. Brooksville School District, 120 Ky. 608, 87 S.W. 792 (1905); Donahoe v. Richards, 38 Me. 376 (1854); Spiller v. Woburn, 94 Mass. 127 (1866); Kaplan v. Independent School District, 171 Minn. 142, 214

such practices as state establishment of religion contrary to the first amendment.[10]

The Supreme Court has never adopted any particular test with reference to Jefferson's "wall of separation"[11] even though secularization of public education has generally become "firmly established in the consciousness of the nation."[12] An extreme approach suggested by a minority of the Court would require a complete divorce of state and religion; any program which fosters cooperation or mutual aid between the two is objectionable regardless of its operation.[13] On the other hand, the "wall", according to the prevailing historical analysis, does not prohibit incidental state aid to religion[14] so long as the state does not directly promote religious dogma.[15] The constitutionality of a program of cooperation between church and state depends on a particularized consideration of the facts of each case.[16]

Of primary importance in the process of fact evaluation is con-

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N.W. 18 (1927); Doremus v. Board of Educ., *supra* note 4; Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908).

[9] People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Board, 136 La. 1034, 68 So. 116 (1915); Freeman v. Scheve, 65 Neb. 853, 93 N.W. 169 (1902); State *ex rel.* Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890).

[10] See Annot., 45 A.L.R.2d 742 (1956).

[11] Reynolds v. United States, 98 U.S. 145, 164 (1878).

[12] See Frankfurter, J., McCollum v. Board of Educ., *supra* note 5; Rutledge, J., Everson v. Board of Educ., 330 U.S. 1 (1946).

[13] "In considering whether a state has entered this forbidden field (state aid to religion) the question is not whether it has entered too far but whether it has entered at all." Black, J., dissenting in Zorach v. Clauson, *supra* note 5 at 318: "The effect of the religious freedom amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business . . ." Jackson, J., dissenting in Everson v. Board of Educ., *supra* note 12 at 26 with Frankfurter, J., concurring in the dissent.

"(The first amendment's purpose) was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." Rutledge, J., dissenting in Everson v. Board of Educ., *supra* note 12 at 32.

[14] For example, the universally permitted property tax exemption for churches.

[15] Zorach v. Clauson, *supra* note 5 at 308; Everson v. Board of Educ., *supra* note 12.

[16] KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE, Ch. 9 (1957); PFEFFER, CHURCH, STATE, AND FREEDOM, 386-91 (1951); Howe, *Religion and Race in Public Education,* BUFFALO LAW REV. 242-47 (1959); Meiklejohn, *Education Cooperation Between Church and State: The First Freedom,* 14 LAW AND CONTEMPORARY PROBLEMS 44-112 (1949); Pfeffer and O'Neill, *The Meaning of the Establishment Clause—A Debate,* 2 BUFFALO LAW REV. 225 (1953); Snee, *Religious Disestablishment and the Fourteenth Amendment,* 1954 WASH. U.L.Q. 371; Sutherland, *Due Process and Disestablishment,* 62 HARV. L. REV. 1306 (1949); Waite, *Jefferson's "Wall of Separation": What and Where?,* 33 MINN. L. REV. 494 (1947).

sideration of the extent of support of religious dogma. If the practice supports any particular religion to the exclusion of others, as in *Schempp*, there is unconstitutional state aid.[17] It is at this point that the portion or version of the Bible used becomes significant. Use of the New Testament is objectional to the Jews, but to confine examination to the Old Testament tends to favor them. In addition, the King James version of the Bible is unacceptable to Catholics.[18] Addition to the Bible reading of such practices as recitation of the Lord's Prayer can be tantamount to a religious service in view of the devotional attitude typically attending prayer. The incidence of devotional practices determines whether the program of the school is instruction about religion or whether it is discipline in dogma.

Secondly, compulsory participation in any religious program, although itself an independent ground for unconstitutionality, contributes to the conclusion that the state aid amounts to establishment. Although overt acts of compulsion are dealt with effectively by the free exercise clause of the first amendment, the subtle compulsion on children to conform to the practices of their schoolmates is equally suppressive since "nonconformity is not an outstanding characteristic of children."[19] The older Schempp boy, in this case, was expressly compelled by the principal to participate in the "devotions" but the younger Schempp child was equally coerced by desire to conform. Similar use of the state authority to draft children into a religious program has been held constitutionally objectionable.[20]

Thirdly, the greater the extent of economic support to religion by the direct disbursement of public tax funds, the more likely it is that there will be prohibited state establishment.[21] In *Schempp*, the classroom facilities and the teachers' salaries were provided at public expense. Use of classrooms in *McCollum* and the absence of use of any public facilities in *Zorach* were distinguishing features which contributed to opposite results on otherwise similar released time programs.[22]

Religion in the public schools is an area where fine distinctions are to be expected so that characterization of facts becomes all-important.[23] Furthermore, the courts will use common sense rather than abstract doctrine to determine whether the public support of religion is so direct as to

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[17] See Jackson, J., McCollum v. Board of Educ., *supra* note 5; Everson v. Board of Educ., *supra* note 12 at 15-16.

[18] 177 F. Supp. 398 at 401-2; Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953); *cert. denied*, 348 U.S. 816 (1954).

[19] Illinois *ex rel.* McCollum v. Board of Educ., *supra* note 5 at 227.

[20] West Virginia v. Barnette, 319 U.S. 624 (1943). *But see* Zorach v. Clauson, *supra* note 5.

[21] *But see* Everson v. Board of Educ., *supra* note 12.

[22] See facts of Zorach v. Clauson, *supra* note 5, and Illinois *ex rel.* McCollum v. Board of Educ., *supra* note 5.

[23] *Supra* note 22.

be objectionable.[24] The Bible reading in this case, disregarding the issues of sectarian discrimination and free exercise, might have been permissible had it not been accompanied by recitation of the Lord's Prayer so as to make the practice essentially devotional. The simple answer is that the *Schempp* case extends no further than its facts. The harder problem is to discover what increments or features of public support will condemn a program as prohibited state aid to religion.

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[24] KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE, *supra* note 16.